Supreme Court, U.S.
FILED
06-294 AUG 8 - 2006
OFFICE OF THE CLERK

No. ——

IN THE

SUPREME COURT OF THE UNITED STATES

CHARLES H. CLARK AND ELIZABETH HAJEK, INDIVIDUALLY, AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED
Petitioners,

vs.

CAROLE KEETON STRAYHORN,
Comptroller of Public Accounts for the State of Texas;
Respondent.

On Petition for A Writ of Certiorari to the
Court of Appeals of Texas
Third District

PETITION FOR WRIT OF CERTIORARI

JAMES M. MCGRAW
LOOPER REED & MCGRAW
A Professional Corporation
1300 Post Oak Blvd., Suite 2000
Houston, Texas 77056
713-986-7000

Counsel for Petitioners

QUESTION PRESENTED

Whether the scheme of using the interest earned on private citizens' unclaimed property funds for the general public, or using private citizens' unclaimed property without just compensation to the private citizen violates the Takings Clause of the Fifth Amendment of the Constitution.

PARTIES

Petitioners Charles H. Clark and Elizabeth Hajek are individuals suing in their individual capacity as well as on behalf of a putative class (hereinafter jointly referred to as "Petitioners"). Petitioners have no parents or subsidiaries within the meaning of the rule.

Respondent is Carole Keeton Strayhorn, the Comptroller of Public Accounts for the State of Texas (the "Comptroller").

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 23

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE TEXAS COURT'S DECISION AND THE HOLDINGS OF THIS COURT 9

A. The well-settled edicts from this Court that interest follows the principal and the failure to pay just compensation amounts to an unlawful taking 9

B. The Reasoning of the Texas Court and the erroneous distinction it makes with Supreme Court precedence ... 16

II. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN TEXAS AND OTHER COURTS ON WHETHER THE STATE'S USE OF INTEREST EARNED ON UNCLAIMED PROPERTY WITHOUT COMPENSATING THE INDIVIDUAL IS AN UNCONSTITUTIONAL TAKING 20

A. The Petitioners' Fifth Amendment rights are treated differently than those of citizens in other states 20

B. The issue is important and will have an impact on the numerous cases pending before various courts in various jurisdictions 22

APPENDIX A

Opinion of the Court of Appeals, Case No. 0305000212-CV; *Charles H. Clark and Elizabeth Hajek, Individually, and on behalf of those similarly situated vs. Carole Keeton Strayhorn, Comptroller of Public Accounts*, in the Third Court of Appeals, Austin, Texas, February 3, 2006

APPENDIX B

Order Refusing Petition for Discretionary Review, *Charles H. Clark and Elizabeth Hajek, Individually, and on behalf of those similarly situated vs. Carole Keeton Strayhorn, Comptroller of Public Accounts*, No. 06-0195, in the Supreme Court of Texas, May 12, 2006

APPENDIX C

Judgment of the Trial Court Denying Class Certification and Dismissing Claim, No. GN300872; *Charles H. Clark and Elizabeth Hajek, Individually, and on behalf of those similarly situated vs. Carole Keeton Strayhorn, Comptroller of Public Accounts*, in the 353rd Judicial District Court of Travis County, Texas, March 21, 2005

APPENDIX D

Order Denying Comptroller's Motion for Rehearing on Order Granting Plaintiff's Motion for Partial Summary Judgment, *Charles H. Clark and Elizabeth Hajek, Individually, and on behalf of those similarly situated vs. Carole Keeton Strayhorn, Comptroller of Public Accounts*, in the 353rd Judicial District Court of Travis County, Texas, January 24, 2005

APPENDIX E

Order Granting Plaintiff Clark's Motion for Partial Summary Judgment and Denying Defendant Comptroller's Motion for Summary Judgment, *Charles H. Clark and Elizabeth Hajek, Individually, and on behalf of those similarly situated vs. Carole Keeton Strayhorn, Comptroller of Public Accounts*, in the 353rd Judicial District Court of Travis County, Texas, December 2, 2004

TABLE OF AUTHORITIES

CASES

Brown v. Legal Foundation of Washington, 538 U.S. 376 (2003) 8,11

Canel v Topinka, 818 N.E.2d 311 (Ill. 2004) 20

Clark v. Strayhorn, 184 S.W.3d 906 (Tex.App.–Austin 2006, pet. denied) ..... *en passim*

England v. Louisiana State Bd. of Med. Exam'ers, 375 U.S. 411 (1964) 21

In re Folding Carton Antitrust Litigation, 744 F.2d 1252 (7th Cir. 1984) 20

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) 8,9

Seaboard Air Line R. v. United States, 261 U.S. 299 (1923) 16

Sellers v. Harris County, 483 S.W.2d 242 (Tex. 1972) 10, 19

Smolow v. Hafer, 2005 WL 1377849 (E.D. Penn. 2005) 17, 20, 21

Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) 9

Texaco, Inc. v. Short, 454 U.S. 516 (1982) 17

Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155 (1980) 8, 20

STATUTES AND CONSTITUTION

La.R.S. 9:163 22

SUP. CT. R. 10 20

TEX. PROP. CODE ANN. § 72.101(a) 3

TEX. PROP. CODE ANN. § 74.301(a) 3

TEX. PROP. CODE ANN. § 74.304(a) 1, 5

TEX. PROP. CODE ANN. § 74.401(a) 2

TEX. PROP. CODE ANN. § 74.501 3

TEX. PROP. CODE ANN. § 74.509 ..... 2, 3, 14, 15

TEX. PROP. CODE ANN. § 74.601 ..... 2, 4, 5, 7, 16, 19

TRAVIS (TEX.) CIV. DIST. CT. LOC. R. 1.1 6

U.S. CONST. AMEND. V 1, 20

28 U.S.C. § 1257 1

78th Leg., R.S., H.B. 826 Bill Analysis 3, 18

MISCELLANEOUS

Ellen P. Aprill, *Inadvertence and the Internal Revenue Code: Federal Tax Consequences of State Unclaimed Property Laws*, 62 U. PITT. L. REV. 123 (2000) 8, 22

Op. Tex. Att'y Gen. No. JM 1228 18

Petitioners challenge the mechanism of the Unclaimed Property Act and the unlawful taking of Petitioners' property without just compensation in violation of Petitioners' rights under the Fifth Amendment of the United States Constitution. Accordingly, Petitioner respectfully petitions this Court for a writ of certiorari to review the decision of the Texas Court of Appeals-Third District.

OPINIONS AND ORDERS BELOW

The Supreme Court of Texas' order refusing discretionary review is unreported. App. 15a. The decision of the Third District Texas Court of Appeals is reported at 184 S.W.3d 906. App. 1a. The judgments and orders entered by the Travis County District Courts are unreported. App. 16a, App. 18a and App. 19a.

JURISDICTION

The judgment of the Texas Court of Appeals was entered on February 3, 2006. App 1a. On May 12, 2006, the Supreme Court of Texas denied a timely filed Petition for Review. App. 15a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. AMEND. V.

The Texas Unclaimed Property Act is codified at Title 6 of the Texas Property Code. This Petition examines the entirety of the Act, but focuses on the following provisions:

Section 74.304(a) provides: "If reported property is delivered to the comptroller, the state shall assume custody of the property and responsibility for its safekeeping."

Section 74.401(a) provides, in pertinent part, " . . . the comptroller shall sell at public sale all personal property, other than money and marketable securities, delivered to the comptroller . . ."

Section 74.509 provides: "A handling fee may be deducted from the amount of the claim payment if the payment is at least $100."

Section 74.601(b) provides, in pertinent part, "[t]he comptroller shall deposit to the credit of the general revenue fund: (1) all funds, including marketable securities, delivered to the comptroller under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller; (2) all proceeds from the sale of any property, including marketable securities, under this chapter; . . . (4) any income derived from investments of the unclaimed money."

STATEMENT OF THE CASE

A. The Petitioners' Claims

The State of Texas, through the Comptroller, has taken the funds of the Petitioners to use for the public good without compensating the Petitioners or giving them their due process under the law. As a result, Petitioners filed a class action suit contending that any interest earned on their money while held by the Comptroller belongs to them as the owners of the money. Alternatively, if the Comptroller spent the money, she must pay the owner interest for that taking from the date she spent the money to the date she returned the principal to the owner. CR 307-320.[1] Both Petitioners owned money in excess of $100 that was turned over to the Comptroller under the Unclaimed Property Act (TEX. PROP. CODE Title 6 , referred to as "the Unclaimed Property Act" or "the

[1]Petitioners will cite the Clerk's Record of the court of appeals as "CR *page number*," the Supplemental Clerk's Record as "CR Supp. *page number*," the Reporter's Record as "RR *volume number/page number*," and the Exhibits from the certification hearing as "AP-EX *exhibit number*." Petitioners will refer to the Comptroller, the office of the Comptroller, and the designated representatives of the Comptroller collectively as "the Comptroller."

Act"). P-EX 8 & 9; RR 3/124-126. The Comptroller eventually returned Petitioners' property, less a handling fee, but did not return or pay any interest. P-EX 8, 9.

B. The Unclaimed Property Act

The Unclaimed Property Act provides a comprehensive program for addressing the disposition of all forms of unclaimed property. Chapters 72 through 75 of the Act apply to personal property that has not been claimed during a "dormancy period," normally three years. *See* TEX. PROP. CODE § 72.101(a). Holders of unclaimed property are required to turn it over to the Comptroller. *Id.* at § 74.301(a). If the unclaimed property is not money or marketable securities, then the Comptroller must sell the property and hold the proceeds for the owner. *Id.* at § 74.401(a). The Comptroller holds the property or money for the owner in perpetuity. P-EX 17 (RFA 2); 78th Leg., R.S., H.B. 826 Bill Analysis.

The Act provides a method for owners to collect their principal from the Comptroller. *Id.* at § 74.501 *et seq.* However, the Act permits the Comptroller to impose a "handling fee" for all claims made in excess of $100. *Id.* at § 74.509. The Comptroller has set and collects a fee of 1% for claim payments of $100 to $5,000, and 1.5% for claim payments in excess of $5,000. P-EX 16 (RFA 7,8); RR 3/139. Petitioners were each required to pay the 1% fee.

C. The Comptroller admitted she earned interest on unclaimed property

Section 74.304(a) of the Act directs the Comptroller to assume custody of the unclaimed money and responsibility for its safekeeping for the benefit of the rightful owner, and the Comptroller has repeatedly represented to the public she is *holding* the unclaimed money, in compliance with the custody and safekeeping mandate. *See, e.g.*, P-EX 19 (RFA 4-9). In her annual publication notice in newspapers, she represents "your money will be here until you claim it" and encourages people to claim their money because the money "doesn't belong in a vault in Austin." P-EX 42.

While the Act requires the Comptroller to deposit the unclaimed money to the credit of the State's general revenue account, § 74.601(b), the Act also provides the Comptroller shall invest the unclaimed money:

> [T]he comptroller shall from time to time invest the amount of unclaimed money in investments approved by law for the investment of state funds.

§ 74.601(d). The Comptroller can and does invest monies that are in the general revenue account. RR 3/93-95.

As for investment of the unclaimed money, the Comptroller provided documents, in response to open records requests, showing the State earned millions of dollars of interest on the unclaimed money. P-EX 10-13. The Comptroller repeated those same facts in response to discovery requests and never amended those discovery responses. P-EX 22 (RFP 12); RR 3/84-88.

D. The trial court originally granted summary judgment in favor of Petitioners

The parties filed opposing motions for summary judgment, Clark seeking a partial summary judgment that interest earned on the property belongs to the owners and the Comptroller seeking to dismiss the case. CR 55, 209. The Honorable Patrick Keel denied the Comptroller's motion and granted Clark's motion, finding:

> The Comptroller's retaining interest accruing on Clark's property while it was in the Comptroller's custody is a taking for public use without just compensation that violates the Texas and United States Constitutions.

CR 199. The Comptroller moved for a rehearing on the two motions for summary judgment, but the Honorable Gisela Triana agreed with Judge Keel and denied the motion. CR 351.

E. The Comptroller then claimed she made several misrepresentations regarding interest earned

After the trial court entered the summary judgment, the Comptroller claimed no interest was ever earned on unclaimed property, RR 3/81,87, despite the existence of evidence to the contrary (P-EX 10-13; P-EX 22 (RFP 12); RR 3/84-88). She claimed all unclaimed money was spent on the very day it was received, RR 3/89, and that she provided false information in response to the open records requests. RR 3/24,83. She further alleged that she provided false information in response to Appellant's discovery requests, although she never supplemented the discovery to reflect that position. RR 3/87. Finally, she alleged her statements that she was *holding* the unclaimed property money were also false. RR 3/89,90,105.

F. At the Class certificate hearing, the Comptroller claimed she spent the unclaimed money on the day it was received

Despite the statutory mandates to assume custody of the unclaimed property and responsibility for its safekeeping, and to invest it from time to time, the Comptroller contended later in the litigation she did none of these. The Comptrollers new position was she spent every dollar of unclaimed property money on the day it was received. RR 33/87,89. Despite the requirement of § 74.304(a) that she maintain custody of the unclaimed property, the Comptroller stated she does not do so. RR 3/105. Despite the requirement of § 74.601(d) that "the comptroller shall from time to time invest the amount of unclaimed money," she claimed she has never invested unclaimed property money. RR 3/104.

The *sole* evidence that the Comptroller spent the unclaimed money is her bare assertion that she spent it. Her new-found position contradicts her open records and un-amended discovery responses. In addition, the Comptroller testified there is no way to track where the unclaimed money went because it has been commingled with other state funds. RR 3/76,92-95, 105-106. Those commingled funds, including the general revenue fund, are invested. RR 3/94-95. Once the unclaimed money is commingled for

investment, the Comptroller has no way to identify which of the commingled money is actually earning the investment income. RR 3/76, 92-95. Finally, the Comptroller testified that although the State is obligated to pay the unclaimed property owners and that she is allegedly no longer holding the money, she does not carry any contingent liability on the State's books for future unclaimed property claims. RR 3/104.

G. The State benefits from the unclaimed property program

The unclaimed property program provides substantial benefits to the State, even after paying out all claims. RR 3/110. Sixty to seventy percent of the unclaimed property is never claimed. RR 3/145. In fiscal year 2004, for instance, the net income to the State after all expenses and paying out claims was at least $109 million. RR 3/131, 146. According to the Comptroller, the requirement to pay interest on unclaimed property would only have a small effect on the State, $1.2 million in fiscal year 2004, leaving the State with $108 million of its $109 million benefit. RR 3/116,132.

H. The judgments below

After the summary judgment, Petitioners moved for class certification, which the Comptroller opposed. CR 321, 384. At the certification hearing, Petitioners presented evidence to the trial court establishing all the elements of class certification. P-EX 1-9, 27, 40, 43-45, 47; RR 2/67-92; RR 3/41-51, 55-58. After the certification hearing, the Honorable Scott Jenkins denied class certification on the sole ground Petitioners had not stated a viable claim. CR 460-61 ("The Court holds that the requirements of Rule 42...have not been met because no class member is able to state a viable takings claim."). In addition, Judge Jenkins dismissed the case in its entirety. *Id.*[2]

The court of appeals determined that, when Judge Jenkins dismissed the action, "he was reconsidering the prior rulings on the

[2]Aspects of this case were heard by several judges because the district courts of Travis County have established a central settings docket in which causes are not assigned to a particular judge. TRAVIS (TEX.) CIV. DIST. CT. LOC. R. 1.1.

State's motion for summary judgment before ruling on class certification," and, therefore, "the district court's order dismissing Clark's case is properly construed as a summary judgment in favor of the State, and Clark's appeal is from that summary judgment." *Clark v. Strayhorn*, 184 S.W.3d 906, 909 (Tex.App.–Austin 2006, pet. denied). The court of appeals affirmed Judge Jenkins' dismissal of the action. In doing so, the court of appeals wrote "we overrule Clark's constitutional issues and need not address his other issues." *Id.* at 915. Petitioner sought review of the decision with the highest court in the state, but the Supreme Court of Texas denied review on May 12, 2006.

REASONS FOR GRANTING THE WRIT

The Comptroller unconstitutionally takes private property without just compensation by failing to pay interest to unclaimed property owners under either one of the two scenarios that may exist in this case. First, if the Comptroller spent the unclaimed property, as she alleged in the hearing below, then that action constitutes a taking of the property and the State is liable to the owners for interest from the date of the taking to the date of the payment of the principal. Second, if the Comptroller invested the unclaimed money, as she is required to do by statute and as she claimed to have done in response to open records and discovery requests, then all interest earned thereon belongs to the property owner. In either case, the Comptroller may not reduce the owners' recovery by any amount other than the handling fee provided by statute to cover the State's expenses.

The trial court denied certification and dismissed the case solely on the issue of viability, and the court of appeals affirmed, holding that "there is no unconstitutional taking of interest on property that is presumed abandoned." *Clark*, 184 S.W.3d at 910. Because, under the Act, title and ownership of property that is presumed abandoned remains, at all times, with the true owner of the property, the trial court and court of appeals used an invalid rationale in reaching their conclusions. Even if the statute is construed to allow "the Comptroller to use abandoned property for the benefit of the State until a claim of ownership has been asserted" as found by the court of appeals, *id.*, rather than investing it as required by §

74.601(d), the controlling fact is the State's "use" of the property. By definition, when the State uses private property for the benefit of the State, a takings has occurred and just or adequate compensation is due and owing. The measure of compensation is the value of the property, plus interest from the date of taking until the date it is turned over to the rightful owner.

This case presents important questions of law concerning the Takings Clause of the Fifth Amendment. The Texas court of appeals ignored the precedents enumerated by this Court. In addition, the Texas holding contradicts the Fifth Amendment rights upheld for unclaimed property claimants in other states. This Court should therefore grant review of the questions presented.

First, the decision of the Texas court conflicts with a long line of jurisprudence from this Court including *Brown v. Legal Foundation of Washington*, 538 U.S. 376 (2003); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) and *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). These cases support the legal axiom that interest follows the principal. As owners of the principal, the Petitioners are also entitled to the interest. Rather than address the well-settled case law, the Texas court of appeals made a distinction without a difference to brush them aside in precursory fashion.

Second, the application of the Texas ruling means the Fifth Amendment affords less rights to unclaimed property claimants in Texas than it does to unclaimed property claimants in other states. There are several decisions in identical cases from other states holding the interest from unclaimed property belongs to the private citizens and cannot be used by the states in violation of the Fifth Amendment.

Unclaimed Property acts are in existence in all 50 states and some authors have claimed 10-25% of Americans have unclaimed property. Ellen P. Aprill, *Inadvertence and the Internal Revenue Code: Federal Tax Consequences of State Unclaimed Property Laws*, 62 U. PITT. L. REV. 123, 123-24 (2000). Some estimates claim there may be $1 trillion in unclaimed assets. *Id.* In Texas

alone, the Comptroller has claimed she is holding over one billion dollars in unclaimed assets that belong to Texas Citizens. P-EX 42.

The Texas court's opinion has now called into question the right of millions of citizens to prevent their state governments from: a) taking their property and using it for public purposes without payment of just compensation (in the form of interest); and b) from taking for public use without payment of just compensation the interest earned on their private property while held by the state for the public's benefit.

Grant of certiorari is necessary because the decision of the Texas court is inconsistent with the holdings of this Court and because it is in direct conflict with other courts' application of the Fifth Amendment as it applies to interest earned on unclaimed property.

I. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE TEXAS COURT'S DECISION AND THE HOLDINGS OF THIS COURT

A. The well-settled edicts from this Court that interest follows the principal and the failure to pay just compensation amounts to an unlawful taking

Petitioners recognize the State has the power to promulgate a statute permitting the Comptroller to use the unclaimed property money. *See Standard Oil Co. v. New Jersey,* 341 U.S. 428, 436 (1951). However, if the State uses the property, it is subject to the constitutional limitation requiring payment of just compensation. *Id.* ("[I]t is clear that a state, *subject to constitutional limitations*, may use its legislative power to dispose of property within its reach, belonging to unknown persons." [Emphasis added]).

In the instant action, there was evidence, albeit disputed, that the Comptroller used Petitioners' money by investing it and earning interest upon it. Then, the Comptroller not only kept the interest, but required Petitioners to pay a fee for the return of their principal.

The initial inquiry centers on ownership of the interest earned by the State. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 159 (1998), this Court held the interest generated from private funds in a government-sponsored account was the private property of the citizen for the purposes of the Takings Clause of the Fifth Amendment. The majority decision discussed the history behind the maxim that interest follows the principal:

> The rule that "interest follows principal" has been established under English common law since at least the mid-1700's. Not surprisingly, this rule has become firmly embedded in the common law of the various States. The Court of Appeals in this case, two of the three judges of which are Texans, held that Texas also follows this rule, citing *Sellers v. Harris County*, 483 S.W.2d 242, 243 (Tex. 1972) ("The interest earned by deposit of money owned by the parties to the lawsuit is an increment that accrues to that money and its owners"). Indeed, in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980), we cited the *Sellers* opinion as demonstrative of the general rule that "any interest . . . follows the principal."

Id. at 165. The Court emphasized that permitting an owner of a sum of money to distribute to a designated beneficiary the interest income generated by his principal is consistent with the "fundamental maxim of property law" that the owner of a property interest may dispose of all or part of that interest as he sees fit. *Id.* at 167.

In *Phillips*, the State of Texas argued the interest income was not private property because the client funds held in the IOLTA accounts "cannot reasonably be expected to generate interest income on their own." The Court rejected the State of Texas' argument and pointed out that a fund can have property status even if it lacks a positive economic or market value. *Id.* at 169-70. The Court held private property rights were implicated, even though the interest income generated by the funds held were created solely by the

governmental mechanism. *Id.* at 170 (relying on *Webb's*, 449 U.S. at 163).

In *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) the Court discussed the limits of the state's ability to use interest earned from private funds. In *Brown*, this Court considered the constitutionality of IOLTA accounts whereby attorneys were required to deposit client funds into one of two separate accounts. If the attorney determined funds could earn net interest, they had to be maintained in an account specifically for that purpose. Funds that could not earn net interest had to be put in the IOLTA account. The interest earned on the IOLTA account had to be paid to the Washington Legal Foundation which provided legal services for the poor and indigent. The plaintiffs challenged whether the payment of the interest earned on the IOLTA accounts amounted to an unlawful taking.

First, this Court reiterated its holding in *Phillips* – the interest income generated by funds held in IOLTA accounts is the "private property" of the owner of the principal. The Court then proscribed the basic tenants of the Fifth Amendment as they apply to the taking of interest generated from a government-created fund:

> While it confirms the State's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a "public use" and "just compensation" must be paid to the owner.

Brown, 538 U.S. at 231-32.[3] This Court in *Brown* and *Phillips* found that the first condition, public use, was unquestionably satisfied. Likewise, in the case *sub judice*, the Comptroller too admits it puts the interest earned on the money to public use.

---

[3] "Often referred to as the Just Compensation Clause, the final Clause of the Fifth Amendment provides: 'nor shall private property be taken for public use, without just compensation.' It applies to the States as well as the Federal Government." *Id.* at 232 n. 6.

This Court then emphasized the difference between a takings per se and a regulatory taking. A physical taking is considered a taking per se and requires compensation no matter how small the share of the physically taken property may be. *Brown*, 538 U.S. at 234. In contrast, a regulatory taking that merely prohibits a certain use of property amounts to a regulatory taking which is characterized on an ad hoc basis. *Id.* at 233. Because the interest earned on the accounts was the private property of the individuals as dictated in *Phillips*, and the money was taken by the government for their sole use, this Court ruled a per se approach was appropriate. *Id.* at 235. Because the interest earned on unclaimed property accounts is the private property of the unclaimed property claimants and the money is taken by the state for its sole use, a per se analysis applies in this case.

After deciding the proper taking analysis, this Court focused most of its attention on whether the plaintiffs in *Brown* were entitled to any just compensation. *Id.* at 235. The "just compensation" required by the Fifth Amendment is measured by the property owner's loss rather than the government's gain. *Id.* at 235-36. Based on that premise, the Court ruled the plaintiff was not entitled to any compensation "for the nonpecuniary consequences of the taking of the interest on his deposited funds, and that any pecuniary compensation must be measured by his net losses rather than the value of the public's gain." *Id.* at 236.

The Court relied on the fact that lawyers were only to put in client funds that could not generate interest on their own in the IOLTA account. The amounts generated in interest on these smaller sums would not cover the administrative costs incurred and therefore the clients were due a just compensation of zero. *Id.* The key holding in *Brown* was summarized as follows:

> We hold (1) that just compensation is measured by the net value of the interest that was actually earned by petitioners and (2) that, by operation of the Washington IOLTA Rules, no net interest can be earned by the money that is placed in IOLTA accounts in Washington.

Id. at 238 n. 10.

Justice Scalia dissented writing the private citizen is entitled to the "fair market value of the interest generated by their funds" and not the allegedly newly–created "net value of the interest." *Id.* at 241 (Scalia, J. dissenting). Justice Scalia pointed out the *Brown* decision contravenes the holding in *Phillips* because the Court refused to treat the interest as the property of the plaintiffs. *Id.* at 242-43.

Justice Scalia continued his disagreement with the majority and its use of the net value of the interest rather than fair market value:

> This definition of just compensation has no foundation in reason. Once interest is earned on petitioner's funds held in IOLTA accounts, that money is petitioners' property. *See Phillips*, 524 U.S. at 168 . . . It is at *that* point that the State appropriates the interest to fund LFW–*after* the interest has been generated in the pooled accounts–and it is at *that* point that just compensation for the taking must be assessed. It may very well be, as the Court asserts, that petitioners could not have earned money on their funds absent IOLTA's mandatory pooling arrangements, but just compensation is not to be measured by what would have happened in a hypothetical world in which the State's IOLTA program did not exist.

Id. at 245 (emphasis in original and parenthetical omitted). Justice Scalia added the ruling in *Brown* embraced the line of argument rejected in Phillips–that the interest earned on client funds in IOLTA accounts could not be deemed "private property" of the clients because those funds "cannot reasonably be expected to generate interest income on their own." *Id.* at 248.

The majority countered in a footnote declaring Justice Scalia's logic was fundamentally flawed because it would not be

hard to imagine a situation where it would cost $2 in administrative and accounting time to figure the client is entitled to receive 50¢. The majority wrote that such a result is inconsistent with the Court's just compensation precedents. *See id.* at 238 n. 10.

Justice Scalia responded that the State would only be required to return the money to the IOLTA account leaving it up to the private individuals to incur the costs to determine the exact amount due the client. *See id.* at 249. According to Justice Scalia, *Phillips* flatly rejected the idea that deductions are to be made for transaction costs and there is no case law to support a "net value" approach. *See id.*

With respect to this case, the Court need not delve into a "net value" analysis because there is no question the State recovered its costs of administrating the funds in addition to the interest that it kept. The Act permits the Comptroller to impose a "handling fee" for all claims made in excess of $100.[4] § 74.509. The Comptroller has set and collects a fee of 1% for claim payments of $100 to $5,000, and 1.5% for claim payments in excess of $5,000. P-EX 16 (RFA 7,8); RR 3/139. The Comptroller collected the fee from Petitioners. Thus, the State has determined what it costs to administer its program, set a fee to recoup those costs, and collected the fee from Petitioners and other members of the putative class.

Because the State has already collected the costs of administration through imposition of its handling fee, there is no need to perform a "net value" analysis. Instead, the case that controls the outcome of this action is *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980). In *Webb's*, this Court addressed a Florida statute providing that interest accruing on an interpleader fund deposited in the registry of the court "shall be deemed income of the office of the clerk of the circuit court." *Id.* at 156 n. 1. In addition to a fee "for services rendered," the clerk of the court also retained additional interest earned on the interpleaded funds. *Id.* at 157.

---

[4]The putative class is limited to stockholders who claims in excess of $100.

In a unanimous decision, this Court held the statute authorizing the clerk to confiscate the earned interest while also collecting a fee for handling the money violated the Takings Clause. The Court summarized, "a State, by *ipse dixit*, may not transform private property into public property without compensation simply by legislatively abrogating the traditional rule that the earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." 449 U.S. at 164. As interpreted by the Court in *Phillips*, *Webb's* stands for the rule that "a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." *Phillips*, 524 U.S. at 167 (citing *Webb's*, 449 U.S. at 163-64).

In *Webb's*, this Court unanimously rejected the proposition that interest or principal deposited in the registry was not the private funds of the owner despite the arguments that (1) the funds were considered "public monies" from the date of the deposit until it left the registry because the Florida "statute takes only what it creates"; and (2) there was no taking because the interest earned is not private property. *See Webb's*, 449 U.S. at 163 (writing the exaction was a forced contribution to the general governmental revenues not reasonably related to the costs of using the court). The Court wrote:

> [W]here there is a separate and distinct state statute authorizing a clerk's fee "for services rendered" based upon the amount of principal deposited; where the deposited fund itself conceitedly is private; and where the deposit in the court's registry is required by state statute in order for the depositor to avail itself of statutory protection from claims of creditors and others - Seminole County's taking unto itself, under 28.33 and 1973 Fla. Laws, ch. 73-282, the interest earned on the interpleader fund while it was in the registry of the court was a taking violative of the Fifth and Fourteenth Amendments.

Id. at 164-65

Webb's holding applies equally to Petitioners' unclaimed property: [1] a separate and distinct state statute authorizes a

handling fee based upon the amount of principal deposited, TEX. PROP. CODE § 74.509; P-EX 16 (RFA 7,8); RR 3/139; [2] the deposited fund itself is private, *e.g.*, the owner retains title; and, [3] the deposit in the government account is required by state statute. TEX. PROP. CODE § 74.601(b)(1). Thus, the Comptroller's "taking unto itself ... the interest earned on the ... fund while it was in the [government's possession] was a taking violative of the Fifth and Fourteenth Amendments," *Webb's*, 449 U.S. at 164-65.

Petitioners acknowledge that there is a disputed fact issue as whether the State actually invested Petitioners property, or whether the State spent it. Assuming for the sake of argument that it was spent, Petitioners have still asserted a viable claim. If Petitioners' property was indeed spent by the Comptroller, then it was taken for public use. Not only was the property taken for public use, but the Comptroller charged Petitioners a fee for the privilege of allowing the State to take and use their property.[5] Where there is this type of *per se* taking of principal belonging to private parties, this Court has held that the measure of just compensation due for the taking is the value of the property at the time of the taking *plus interest* between the time of the taking and the time of payment of just compensation. *Seaboard Air Line R. v. United States*, 261 U.S. 299, 306 (1923). In this case, this rule means that Petitioners are entitled to the value of their property at the time the Comptroller spent the unclaimed property plus interest from the time the Comptroller spent the money to the time she returned the money to Petitioners.

B. The Reasoning of the Texas Court and the erroneous distinction it makes with Supreme Court precedence

Rather than consider the guidance provided by this Court, the Texas court of appeals relied upon many of the same arguments rejected in *Brown*, *Phillips* and *Webb's*. The court of appeals attempted to distinguish the interest earned on unclaimed property and interest earned on IOLTA or interpleaded funds. The Texas

---

[5]Notably, Petitioners and other putative class members had no way of knowing their money was being spent by the State, particularly given the fact that the Comptroller publicly advertised that she was holding the money and that it did not belong in a vault in Austin.

court claimed the accounts addressed in *Brown, Phillips* and *Webb's* "are held in trust for the owner" with no question of ownership. *Clark*, 184 S.W.3d at 915. The Texas court then noted unclaimed property is assumed abandoned. *Id.* The court concluded until a claim is made for the funds by the rightful owner, "it is wholly appropriate for the Comptroller to use unclaimed property for the benefit of the State instead of allowing a windfall to a private holder or permitting the funds to lie fallow." *Id.* at 914.

The Texas court erroneously relied upon this Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). *Texaco* dealt with a statute that actually transferred title to the property to a new owner. It involved a statute providing that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property. *Id.* at 518. The Court recognized that states have the power to permit abandoned interests in property to revert to another after the passage of time. *Id.* at 526. After discussing several opinions recognizing that rule of law, the Court held:

> These decisions clearly establish that the State of Indiana has the power to enact the kind of legislation at issue. In each case, the Court upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse.

Id. at 529.

Thus, *Texaco* is limited to cases where the owner *lost* title to the underlying property to another private party. Under the Texas Unclaimed Property Act, and uniform acts in other States, the owner *retains* title to the property at all times. Since there was no transfer of title to Petitioners' unclaimed property, *Texaco* does not apply. *Smolow v. Hafer*, 2005 WL 1377849 at *3-4 (E.D. Penn. 2005)(holding *Texaco* is inapplicable to claims for interest under a

custodial unclaimed property statute because there is no transfer of title to the state).

As recognized by the Texas court of appeals, the Texas Unclaimed Property Act is a *custodial* statute under which the "true owner" of the property retains title even while the Comptroller has custody of the unclaimed property. *Clark,* 184 S.W.3d at 911. The Comptroller, Texas Attorney General, and Texas Legislature likewise recognize the custodial nature of the statute and the fact that title never passes to the State. P-EX 17 (RFA 2); Op. Tex. Att'y Gen. No. JM 1228, p. 6527 (1990) (citing opinion MW-186 (1980) "the state never actually takes title to the property..."); 78th Leg., R.S., H.B. 826 Bill Analysis.[6] Thus, at all times relevant to this litigation, Petitioners were the owners of the property held and used by the State.

The court of appeals' entire analysis is premised upon its conclusion that, while title remains in the true owner of any unclaimed property held by the State, the State does not hold the property in trust. *Clark,* 184 S.W.3d 911-13. According to the court of appeals, because there is no trust relationship, the State is "free to

---

[6]The only difference between the views of the Comptroller and the Legislature and that of the court of appeals relates to whether a trust relationship is created. While the court of appeals determined the state does not hold the unclaimed property in trust for the true owner, *Clark,* 184 S.W.3d at 911-12, the Comptroller and the Legislature have taken the position that it does. For example, the Comptroller's website states:

> [T]he Comptroller's office acts *only as custodian* for the missing owners, holding the property *in trust* until it is claimed. *Texas never takes legal ownership of the property*, so there is no time limit for filing a claim.

P-EX 17 (RFA 2) (emphasis added). Similarly, in explaining the nature of the unclaimed property statute the Legislature took the position:

> The comptroller's office acts *only as custodian* for the missing owners, holding the property *in trust* until it is claimed; *Texas never takes legal ownership of the property.*

78th Leg., R.S., H.B. 826 Bill Analysis (emphasis added).

use unclaimed property for the benefit of the State instead of allowing a windfall to a private holder or permitting the funds to lie fallow" and there is no unconstitutional taking. *Id.* at 914-15.

The flaw in the court of appeals' analysis is its focus on whether the property is held in trust. That failed argument is no different than attempts made by other states to unlawfully take the citizens' property by artfully describing the nature of the property taken. For example, in *Webb's*, the State of Florida argued without the statute the clerk would have no authority to invest the money held in the registry and that the state was entitled to take only what it created. 449 U.S. at 163. In *Phillips*, the State of Texas argued the IOLTA funds had no market value to the true claimants and any value was created by the government. 524 U.S. at 169-70. In *Brown*, the State of Washington argued there was no taking because the IOLTA program created income where there was not any before. 538 U.S. 226.[7]

---

[7] The Comptroller's arguments have likewise failed with the Supreme Court of Texas. *Sellers v. Harris County*, 483 S.W.2d 242, 243 (Tex. 1972). Just as Texas Property Code § 74.601 requires the interest earned on unclaimed money be placed in the general revenue fund of the State, the statute at issue in *Sellers* required the funds to "draw interest for the benefit of the county." 483 S.W.2d at 243. The county argued, and the court of appeals held, that under the applicable statutes the interest earned on the money belonged to the State based on a statutory provision that dictated as much. *Id.* The Supreme Court of Texas disagreed. In reversing the court of appeals, and holding that the county's retention of the interest was unconstitutional, the Court wrote:

> The difficulty with [the court of appeal's] holding is that these funds are not owned by the county.... The interest earned by deposit of the money ... is an increment that accrues to that money and to its owners.

Id. The Supreme Court of Texas went on to hold that the government's retention of that interest, although permitted by statute, violated the Texas and United States Constitutions. *Id.* at 244. Like the court of appeals in *Sellers*, the Texas court of appeals in this case missed the point when it recognized that title to the property remained in Petitioners, but held that because the property was not held in trust there were no constitutional implications. "The difficulty with [the court of appeal's] holding is that [the unclaimed property] funds are not owned by the [State.]" 483 S.W.2d at 243.

Regardless of whether the State simply retains custody of the property until it is claimed by the rightful owner, or whether it is held in trust by the State until claimed, the constitutional takings analysis under the Fifth Amendment is the same: Did the State take property belonging to a private individual and use it for State benefit? If it did, then it owes just compensation for the use of that property and the failure to pay that compensation is unconstitutional, particularly where, as here, the State is imposing a fee upon the owner for the State's taking and use of the property. U.S. CONST. AMEND. V; *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980). Because the answer is in the affirmative, the state court of last resort has decided an important question of federal law not settled by this Court and, in fact, in a way that conflicts with the relevant decisions of this Court. SUP. CT. R. 10(c).

II. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN TEXAS AND OTHER COURTS ON WHETHER THE STATE'S USE OF INTEREST EARNED ON UNCLAIMED PROPERTY WITHOUT COMPENSATING THE INDIVIDUAL IS AN UNCONSTITUTIONAL TAKING

A. The Petitioners' Fifth Amendment rights are treated differently than those of citizens in other states

The rationale employed by the court of appeals in this case was recently addressed by the Illinois Supreme Court in *Canel v Topinka*, 818 N.E.2d 311 (Ill. 2004). Illinois argued "owners who abandon property no longer retain a property interest in the income accruing on the abandoned property once it is transferred to the states and that, as a result, no taking occurs." *Id.* at 323. The Illinois Supreme Court delineated abandoned property under the custodial unclaimed property act and escheated property whereby the former owner has forsaken all property rights. *Id.* at 327.[8]

[8]The Texas court of appeals confuses the two concepts as evidenced by its reliance on *In re Folding Carton Antitrust Litigation*, 744 F.2d 1252 (7th Cir. 1984) because that case dealt expressly with an escheat statute and not a custodial statute like the one at issue. *See Clark*, 184 S.W.3d at 913. Moreover, the *In re Folding Carton Antitrust Litigation* case did not discuss the use of the interest generated from the funds at issue. The Texas court also erroneously relied on *Fong v. Westly*, 117 Cal.App.4th 841, 843, 853 (2004). The issue in *Fong* was not about interest, but the

Rejecting the idea that because the property is "abandoned" the income derived from the property belongs to the state, the Illinois Supreme Court wrote:

> Defendants propose that the state is 'generous' in returning the shares of stock and keeping only the dividends issued on the stock. We reject the notion that the state, as the custodian of stock placed in its hands for safekeeping, may claim that it is entitled to the dividends issued on the stock. [Citation omitted]. At all times the shares of stock remained the private property of the Plaintiff. Under the circumstances, *the dividends, as an incident of ownership, were also private property.*

Id. at 331 (remanding to allow the trial court to consider the issue of just compensation).

A federal district judge in Pennsylvania also rejected the very arguments asserted by the Comptroller in a related case. *See Smolow v. Hafer*, 2005 WL 1377849 (E.D.Pa. 2005). Pennsylvania's treasurer, relying on *Texaco*, argued that because there has been an abandonment, there is no taking. *Id.* at *3. The district judge ruled the treasurer's reliance on Texaco "failed to address plaintiff's claim, and supporting authority, that a taking without just compensation resulted only when defendant failed to pay him interest upon his confiscated property." *Id.* at *4. The district court accordingly denied the motion to dismiss and allowed the claim to proceed.[9]

---

ability to sell the stock.

[9]*Smolow* presents an internal conflict within the State of Pennsylvania. The state court determined the state's use of the interest from unclaimed property was not a taking. *See Smolow v. Hafer*, 867 A.2d 767 (Pa.Commw.Ct. February 9, 2005). The Eastern District Court of Pennsylvania determined the petitioner had properly reserved his federal claims pursuant to the procedure announced in *England v. Louisiana State Bd. of Med. Exam'ers*, 375 U.S. 411 (1964), by disclosing his federal claims and the reservation to the state court. *Smolow*, 2005 WL 1378849 at *1. Because of that reservation, the federal court was free to, and actually did, ignore the state court's opinion on the federal question. *Id.* at *3. The Texas court of appeals decision that is the basis of this Petition cited the prior *Smalow* decision from the state

Accordingly, there is a split between the highest court in Texas on one hand, the Eastern District of Pennsylvania and the highest court in Illinois on the other on whether refusing to pay interest to the claimants of unclaimed property is an unconstitutional taking. The Texas court of appeals has decided an important question of federal law in a way that conflicts with the decision of another state court of last resort or of a federal court in another jurisdiction. *See* SUP. CT. R. 10(b). Petitioners therefore respectfully request that this Court grant certiorari to ensure that citizens of all States enjoy the same rights with regard to the governmental takings of money.

B. The issue is important and will have an impact on the numerous cases pending before various courts in various jurisdictions

Almost every state has some form of unclaimed property provision. Some of them expressly mandate any interest earned must be paid to the private claimant. *See, e.g.,* La.R.S. 9:163 (Louisiana). As shown herein, many do not, including Texas and Illinois. According to at least one law review article, 25% of Americans are owed money and the amount of unclaimed property may amount to some $1 trillion. Ellen P. Aprill, *Inadvertence and the Internal Revenue Code: Federal Tax Consequences of State Unclaimed Property Laws*, 62 U. PITT. L. REV. 123, 123-24 (2000).

Thus, courts all over this country will be forced to answer the very question presented herein that should be answered by this Court. Each state's unclaimed property scheme that does not pay interest is subject to this review. The process has already begun in many states. For example, the aforementioned *Smolow* case is still pending in the Eastern District Court of Pennsylvania as of the filing of this Writ. The *Canel* case was remanded for class certification issues.

---

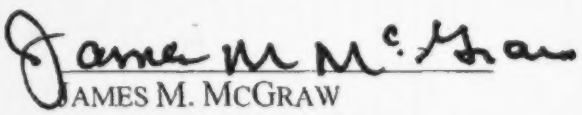
court, but ignored the subsequent federal district court *Smalow* opinion holding there was a takings claim. *See Clark*, 184 S.W.3d at 914.

The question presented herein is therefore ripe for review by this Court. In addition to the conflicting holdings already in place, judicial resources would be reserved by a decision on the issue now. With guidance from this Court, the cases can be streamlined and resolved in an efficient manner to benefit the litigants, the courts and the taxpayers. Waiting for other lower courts to weigh in would only prejudice the rights of Petitioners as the question presented herein about the Fifth Amendment will need uniform resolution from this Court. Given the recurring nature of this issue, Petitioners respectfully request that this Court grant certiorari to ensure the correct takings analysis is applied to all litigants in all states.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



JAMES M. MCGRAW
LOOPER REED & MCGRAW
A Professional Corporation
1300 Post Oak Boulevard,
Suite 2000
Houston, Texas 77056
(713) 986-7000
Fax (713) 986-7100

Attorneys for Petitioner

APPENDIX

TABLE OF CONTENTS

A. Opinion of the Court of Appeals, Case No. 0305000212-CV; *Charles H. Clark and Elizabeth Hajek, Individually, and on behalf of those similarly situated vs. Carole Keeton Strayhorn, Comptroller of Public Accounts*, in the Third Court of Appeals, Austin, Texas, February 3, 2006 ..... 1a

B. Order Refusing Petition for Discretionary Review, *Charles H. Clark and Elizabeth Hajek, Individually, and on behalf of those similarly situated vs. Carole Keeton Strayhorn, Comptroller of Public Accounts*, No. 06-0195, in the Supreme Court of Texas, May 12, 2006 ..... 15a

C Judgment of the Trial Court Denying Class Certification and Dismissing Claim, No. GN300872; *Charles H. Clark and Elizabeth Hajek, Individually, and on behalf of those similarly situated vs. Carole Keeton Strayhorn, Comptroller of Public Accounts*, in the 353rd Judicial District Court of Travis County, Texas, March 21, 2005 ..... 16a

D Order Denying Comptroller's Motion for Rehearing on Order Granting Plaintiff's Motion for Partial Summary Judgment, *Charles H. Clark and Elizabeth Hajek, Individually, and on behalf of those similarly situated vs. Carole Keeton Strayhorn, Comptroller of Public Accounts*, in the 353rd Judicial District Court of Travis County, Texas, January 24, 2005 ..... 18a

E. Order Granting Plaintiff Clark's Motion for Partial Summary Judgment and Denying Defendant Comptroller's Motion for Summary Judgment, *Charles H. Clark and Elizabeth Hajek, Individually, and on behalf of those similarly situated vs. Carole Keeton Strayhorn, Comptroller of Public Accounts*, in the 353rd Judicial District Court of Travis County, Texas, December 2, 2004 ..... 19a

APPENDIX A – OPINION OF THE THIRD DISTRICT COURT OF APPEALS OF THE STATE OF TEXAS DECIDED FEBRUARY 3, 2006

Court of Appeals of Texas,Austin.
Charles H. CLARK and Elizabeth Hajek, Individually, and on behalf of all other personssimilarly situated, Appellants,
v.
Carole Keeton STRAYHORN, Comptroller of Public Accounts, Appellee.
No. 03-05-00212-CV.
Feb. 3, 2006.
184 S.W.3d 906

Before Justices B.A. SMITH, PEMBERTON and WALDROP.

OPINION

[*908] BEA ANN SMITH, Justice.

Appellants Charles H. Clark and Elizabeth Hajek (collectively, Clark) filed suit in Travis County alleging that the Comptroller's failure to pay interest when returning unclaimed property was an unconstitutional taking. *See* U.S. Const. amend. V; Tex. Const. art. I, §§ 17, 19; Tex. Prop.Code Ann. §§ 72.001-74.710 (West 1995 & West Supp.2005) (Unclaimed Property Act). Clark moved to certify a class including all persons who had received payment for a claim exceeding $100 under the unclaimed property act. After a hearing on certification and the viability of Clark's claims, the district court denied the motion to certify the class and dismissed the suit. Clark appeals and asks this Court to certify the class and remand the case for further proceedings. Because the payment of interest to owners of unclaimed property is not required by statute or the constitution, we affirm the district court's judgment.

PROCEDURAL POSTURE

Before reaching the merits of Clark's appeal, we must first review the procedure underlying the district court's judgment. Clark initially

obtained a favorable ruling on summary judgment. District Judge Patrick Keel denied the Comptroller's motion for summary judgment [FN1] and granted partial summary judgment holding that the Comptroller's retention of any interest earned on unclaimed property would be an unconstitutional taking. Later, District Judge Gisela Triana [FN2] denied the Comptroller's motion for rehearing of its motion for summary judgment, and the case proceeded to a hearing on the issue of class certification before District Judge Scott Jenkins.

At the class certification hearing, the district court heard expert testimony regarding the class certification requirements. The hearing then turned to the question of whether the State had actually earned interest on unclaimed property as alleged by Clark. In response to an open records request, the Comptroller had initially reported earning millions of dollars of interest on unclaimed property. This report had been corrected in writing before the hearing, and witnesses for the Comptroller testified that no interest had been earned because unclaimed property is deposited into an account that has a negative balance. The Comptroller asserts that the money is spent the moment it is received.

Without resolving the fact dispute on interest, Judge Jenkins acknowledged the prior partial summary judgment, but explained that he was compelled to revisit the issue:

> I've never been in a situation where we've already had partial summary [*909] judgments on a prospective class action. And again, I said at the outset that this is a classic case for a Rule 2.6 under our local rules, assignment to a particular judge. It's just one of those things that didn't happen and now we've had three judges touch it.
>
> But I'm in the position where I'm going to-before I amplify this ruling to somewhere in the neighborhood of 200,000 Texans prospectively, *I'm going to scrutinize the summary judgment.* And if I

> conclude that it's not a viable claim, notwithstanding that ruling being the ruling in the plaintiffs' case here, then I'm going to decline to grant the class certification.

(Emphasis added.) Citing the recent supreme court opinion in *State Farm Mutual Automobile Insurance Co. v. Lopez,* 156 S.W.3d 550, 557 (Tex.2004), Judge Jenkins issued a case dispositive order stating that the court "tried the issue of whether a class member can state a viable takings claim, *before* considering a ruling on the issue of class certification." (Emphasis added.) In his order, Judge Jenkins determined that Clark had not asserted a viable takings claim, denied the motion to certify the class, and dismissed Clark's suit.

In *Lopez,* the supreme court held that "dispositive issues should be resolved by the trial court before certification is considered." *Id.* *Lopez* could not and did not create a new procedural device for making a case dispositive ruling in the context of a class certification hearing. "Deciding the merits of the suit in order to determine the scope of the class or its maintainability as a class action is not appropriate." *Intratex Gas Co. v. Beeson,* 22 S.W.3d 398, 404 (Tex.2000). "Viability" is not a requirement for class certification under Rule 42. *See* Tex.R. Civ. P. 42. The cited language from *Lopez* simply emphasizes that case dispositive issues, such as might be raised by special exception or a motion for summary judgment, should be resolved before a court considers the question of class certification under Rule 42. *See Lopez,* 156 S.W.3d at 556-57 (admonishing trial courts not to "certify now and worry later"). It is clear from the district court's dispositive order that Judge Jenkins understood the basic holding of *Lopez* and that he was reconsidering the prior rulings on the State's motion for summary judgment before ruling on class certification. [FN3] *See Fruehauf Corp. v. Carrillo,* 848 S.W.2d 83, 84 (Tex.1993) (trial court has power to set aside interlocutory orders any time before final judgment entered); *Loy v. Harter,* 128 S.W.3d 397, 409 (Tex.App.--Texarkana 2004, pet. denied) (trial court has inherent authority to reconsider partial summary judgment at any time until

plenary power expires). Accordingly, the district court's order dismissing Clark's case is properly construed as a summary judgment in favor of the State, and Clark's appeal is from that summary judgment.

DISCUSSION

Clark's challenge to the district court's summary judgment is premised on his interpretation that the statute requires the Comptroller to pay interest on unclaimed property in her possession. Clark argues that the statute is constitutional and that the Comptroller's failure to pay interest on returned unclaimed property both violates the statute and amounts to an unconstitutional [*910] taking. *See* U.S. Const. amend. V; Tex. Const. art. I, §§ 17, 19. Citing specific language in the statute that requires the Comptroller to invest unclaimed property and keep it safe, Clark asserts that the legislature intended that the Comptroller hold unclaimed property in trust and pay interest to owners. *See* Tex.Prop.Code Ann. §§ 74.304(a), .601. To support this assertion, Clark relies on the custodial nature of the statute. Thus, Clark compares the Comptroller's possession of unclaimed property to other contexts in which courts have found that interest is owed when the State holds private property.

We hold that there is no unconstitutional taking of interest on property that is presumed abandoned. Viewed as a whole, the statute does not establish a trust relationship between the Comptroller and the original owner of unclaimed property. Rather, the unclaimed property act creates a mechanism for individuals to reclaim their lost property but empowers the Comptroller to use abandoned property for the benefit of the State until a claim of ownership has been asserted.

The Unclaimed Property Act

Under the unclaimed property act, personal property is presumed abandoned if, for longer than three years, (1) the existence

and location of the owner is unknown to the holder of the property and (2) a claim to the property has not been asserted or an act of ownership has not been exercised.[FN4] *Id.* § 72.101. Holders of property presumed abandoned are required to deliver that property to the Comptroller. *Id.* § 74.301. A holder who fails to deliver property within the prescribed time must pay penalties and interest to the Comptroller. *Id.* §§ 74.705, .706.

The statute requires the Comptroller to keep a record of all property received and to deposit the property in the "general revenue fund." *Id.* § 74.601(a), (b). The statute anticipates that the Comptroller will invest the property:

> (d) Except as provided by Subsection (e), the comptroller shall from time to time invest the amount of unclaimed money in investments approved by law for the investment of state funds.
>
> (e) The comptroller may from time to time sell securities, including stocks, bonds, and mutual funds, received under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller and use the proceeds to buy, exchange, invest, or reinvest in marketable securities. When making or selling the investments, the comptroller shall exercise the judgment and care of a prudent person.

Id. § 74.601(d), (e).

The unclaimed property act contains detailed provisions requiring the Comptroller to give notice to property owners of their right to recover unclaimed property in the Comptroller's possession. *Id.* §§ 74.201-.205. A list of all owners must be compiled and made available to the public. *Id.* § 74.307.

The statute sets forth procedures through which an owner may reclaim property by filing a claim with either the Comptroller

or the original holder of the property. *Id.* §§ 74.501, .502 (claim filed with Comptroller), 76.501-.505 (claim filed with holder). The Comptroller may hold a hearing to determine the validity of a [*911] claim. *Id.* § 74.504. That determination, or the Comptroller's failure to make a timely decision, may be appealed by filing suit against the State in district court in Travis County. *Id.* § 74.506.

Statutory Construction

The unclaimed property act does not contain any provision directing the Comptroller to pay interest to owners. Clark asserts that the statute implies a trust relationship between the State and owners that creates a duty to pay interest. We will examine Clark's construction of the statute in light of its plain language. *See Texas Nat. Res. Conservation Comm'n v. Lakeshore Util. Co., Inc.*, 164 S.W.3d 368, 378 (Tex.2005) (we ascertain and give effect to legislature's intent by looking at plain language of statute). We derive the legislature's intent by reading the entire act, not a single section in isolation. *See id.; Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 866 (Tex.1999).

Clark's contention that unclaimed property is held in trust for owners and that interest must be paid rests primarily on two provisions in the statute. First, "the state shall assume custody of the property and responsibility for its safekeeping." Tex. Prop.Code Ann. § 74.304(a). Section 74.601 also instructs the Comptroller to "from time to time invest" the unclaimed property, and when making such investments, "exercise the judgment and care of a prudent person." *Id.* § 74.601(d), (e). We agree that these provisions confirm the custodial nature of the statute, but conclude that the Comptroller is directed to invest the unclaimed property for the benefit of the State, not the owners.

Escheat statutes like the unclaimed property act can be either absolute or custodial in nature. *See Texas Mun. League Intergovernmental Risk Pool v. Texas Workers' Comp. Comm'n*, 74 S.W.3d 377, 382 (Tex.2002). Under absolute escheat statutes, title

passes to the State. *Id.* "Custodial statutes, by contrast, do not divest the 'true owner' of title and instead serve the dual purposes of reuniting owners with unclaimed funds or property and giving the state, rather than the holder, the benefit of the use of the unclaimed funds or property pending reclamation." *Texas Workers' Comp. Comm'n v. Texas Mun. League Intergovernmental Risk Pool,* 38 S.W.3d 591, 597-98 (Tex.App.-Austin 2000), *aff'd,* 74 S.W.3d 377 (Tex.2002) (citing 30A C.J.S. *Escheat* § 2(b)). In fact, it is widely accepted that unclaimed property statutes that are custodial in nature are intended to allow use of the property to generate revenue for the State until the property is claimed by the owner. *See, e.g., Commonwealth Edison Co. v. Vega,* 174 F.3d 870, 872 (7th Cir.1999) (unclaimed property is "an interest free loan to the state-in perpetuity if the owner never shows up to claim it"); *Louisiana Health & Indem. Co. v. Tarver,* 635 So.2d 1090, 1092 (La.1994) (custodial escheat statute serves two purposes-to raise revenue for state and safeguard unclaimed property); *Fong v. Westly,* 117 Cal.App.4th 841, 844, 12 Cal.Rptr.3d 76 (2004); 1 David J. Epstein, Unclaimed Property Law and Reporting Forms § 1.07; K. Reed Mayo, *Virginia's Acquisition of Unclaimed and Abandoned Property,* 27 Wm. & Mary L.Rev. 409, 420 (1986) (uniform unclaimed property act provides states method for raising revenue).

Clark relies on a recent opinion of the Ninth Circuit Court of Appeals to assert that unclaimed property must be held "in trust." *Taylor v. Westly,* 402 F.3d 924, 931 (9th Cir.2005). The Ninth Circuit explained that the use of "traditional trust language" in the California statute established a custodial trust:

> [*912] The care and custody of all property delivered to the Treasurer or Controller pursuant to this title is assumed by the State for the benefit of those entitled thereto ...

Id. (quoting Cal.Civ.Proc.Code § 1361). Clark argues that Texas's unclaimed property act creates a similar trust relationship by stating "the state shall assume custody of the property and responsibility for

its safekeeping." Tex.Prop.Code Ann. § 74.304(a). This comparison disregards a key difference between California and Texas's unclaimed property acts. The California statute requires that all funds received be deposited in a separate "trust fund for the interests of all parties having an interest in the property." *Taylor*, 402 F.3d at 930 (citing Cal.Civ.Proc.Code § 1313). The court held that this provision created a custodial trust: "[T]o the extent that the funds remained in the state's special account, they were being held in trust, rather than being in the state treasury." *Id.* at 931.[FN5] By contrast, the Texas statute directs that unclaimed property be deposited in the State's general revenue fund, not in a separate trust fund for owners. *See* Tex. Prop.Code Ann. § 74.601(b). We hold that the *Taylor* opinion, relying as it does on the statutory creation of a separate trust fund for owners, does not control our interpretation of the Texas act which has no such provision for a custodial trust.

The only trust language in the Texas act is found in section 74.708, "Property Held in Trust," and it establishes a trust relationship between the State and holders who fail to deliver unclaimed property to the State:

> A holder who on June 30 holds property presumed abandoned under Chapters 72-75 holds the property in trust for the benefit of the state on behalf of the missing owner and is liable to the state for the full value of the property, plus any accrued interest and penalty. A holder is not required by this section to segregate or establish trust accounts for the property provided the property is timely delivered to the comptroller in accordance with section 74.301.

Id. This section also makes clear that the property is held in trust for the benefit of the State, not for the benefit of the owner. The legislature addressed when property should be held in trust and failed to create a trust relationship between the State and the owner of unclaimed property.

Conspicuously, the legislature not only avoided creating such a trust relationship, but greatly limited the Comptroller's liability to the owner of unclaimed property:

> The comptroller is not, in the absence of negligence or mishandling of the property, liable to the person who claims the property for damages incurred while the property or the proceeds from the sale of the property are in the comptroller's possession. But in any event the liability of the state is limited to the extent of the property delivered under this chapter and remaining in the possession of the comptroller at the time a suit is filed.

Id. § 74.304(d).[FN6] This provision limits the Comptroller's liability, regardless of any [*913] malfeasance, to the amount of the property still in the Comptroller's possession. Such a limitation is inconsistent with a trust relationship.

As noted, the statute contains no specific directive that the Comptroller pay interest to owners of unclaimed property. *Compare id.* § 74.501(b), *with id.* § 74.705 (holder who fails to deliver unclaimed property to State must pay interest). Viewing the statute as a whole, we hold that it does not create a trust relationship that would require the Comptroller to pay interest to owners.

Unconstitutional Taking

Having found that owners are not entitled to interest under the unclaimed property act, we next address Clark's claim that payment of interest is required by the constitution. Clark does not contest a State's power to deem private property abandoned and allow that property to escheat to the State.[FN7] *See Texaco, Inc. v. Short,* 454 U.S. 516, 530, 102 S.Ct. 781, 70 L.Ed.2d 738 (1982); *Standard Oil Co. v. New Jersey,* 341 U.S. 428, 436, 71 S.Ct. 822, 95 L.Ed. 1078 (1951). Even when an owner of unclaimed property

retains title, however, the State does not hold property in trust for the missing owners.

For the State to take possession, property must first be presumed abandoned under the statute. *See* Tex. Prop.Code Ann. § 72.101 (property presumed abandoned if unclaimed for over three years). As a general rule, the United States Supreme Court has held that private property may be deemed abandoned and that the State is not required to "compensate the owner for the consequences of his own neglect." *Texaco, Inc.*, 454 U.S. at 530, 102 S.Ct. 781. This principle has been relied upon to hold that other custodial escheat statutes do not violate the takings clause. In *In re Folding Carton Antitrust Litigation,* the Seventh Circuit Court of Appeals considered the constitutionality of a statute providing that, after five years, unclaimed funds held in the registry of the court be deposited in the Treasury in the name and to the credit of the United States. 744 F.2d 1252, 1255 (7th Cir.1984) (discussing 28 U.S.C.A. § 2042). Claimants were still permitted to petition the court for return of their funds. *Id.* The Seventh Circuit found no unconstitutional taking:

> Since any legitimate claimant has been afforded an adequate remedy against the United States, there is no bar to interim governmental use of the escheated money "deposited in the Treasury and to the credit of the United States."

Id. (quoting 28 U.S.C.A. § 2042). The same reasoning has been applied to defeat takings challenges to unclaimed property [*914] statutes in other states. *See Smolow v. Hafer,* 867 A.2d 767, 775 (Pa.Commw.Ct.2005) (no unconstitutional taking where abandonment of property, not action of State, caused pecuniary loss); *Fong,* 117 Cal.App.4th at 853, 12 Cal.Rptr.3d 76 ("No unconstitutional taking occurs where a state exercises its right to take custody of abandoned property, as opposed to taking absolute title."). We conclude that this principle applies with equal force to Texas's unclaimed property act. Once the property is presumed abandoned, the State's lawful use of that property for its own benefit

cannot be an unconstitutional taking. *See Texaco, Inc.*, 454 U.S. at 530, 102 S.Ct. 781; *In re Folding Carton Antitrust Litigation*, 744 F.2d at 1255; *Smolow*, 867 A.2d at 775; *Fong*, 117 Cal.App.4th at 854, 12 Cal.Rptr.3d 76.

Arguing that *Texaco, Inc. v. Short* and its progeny do not apply to this case, Clark directs us to cases discussing an owner's right to interest earned on interpleader funds and IOLTA [FN8] accounts. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980), the United States Supreme Court held unconstitutional a statute allowing a county to retain interest earned on an interpleader fund deposited in the registry of the court. The United States Supreme Court rejected the lower court's characterization that funds deposited into a court's registry temporarily assumed the status of "public money." *Id.* at 163, 101 S.Ct. 446. The Court noted that the interest on interpleader funds retained by the county bore no relation to any burden on the court and, thus the state's use of the funds while in the court's registry violated the Takings Clause of the Fifth Amendment. *Id.* at 164, 101 S.Ct. 446. The Court explained that "the earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." *Id.* In *Sellers v. Harris County*, the Texas Supreme Court similarly held that a county may not constitutionally retain the interest earned on interpleader funds. *See* 483 S.W.2d 242, 243 (Tex.1972) (interpleader funds held "in trust" and earnings on fund are incident of ownership). The United States Supreme Court has also held that interest earned by IOLTA accounts is the private property of the owner of the principal. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 172, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998). Citing *Webb's* and *Sellers*, the Court emphasized the common law notion that "interest follows principal." *Id.* at 165, 101 S.Ct. 446. Clark would have us apply this legal axiom to unclaimed property.

But Clark overlooks an important distinction between the interpleader and IOLTA cases and the issue of interest earned on unclaimed property. Interpleaded funds and funds deposited in an

IOLTA account are held in trust for the owner. As we have discussed, unclaimed property funds are not. There is also no question as to who has asserted ownership of the interpleaded or IOLTA funds. By contrast, property delivered to the Comptroller as "unclaimed" is presumed abandoned. *See* Tex. Prop.Code Ann. §§ 72.101, 74.301. Until a missing owner asserts a claim, it is wholly appropriate for the Comptroller to use unclaimed property for the benefit of the State instead of ***915** allowing a windfall to a private holder or permitting the funds to lie fallow. *Cf. Texaco, Inc.,* 454 U.S. at 530, 102 S.Ct. 781.

We hold that the unclaimed property act does not require the State to hold unclaimed property in trust or otherwise require payment of interest to owners. Moreover, the State's use of unclaimed property and retention of any interest earned before the owner asserts a claim is not an unconstitutional taking. Accordingly, we overrule Clark's constitutional issues and need not address his other issues.

CONCLUSION

We affirm the district court's summary judgment, its denial of class certification, and its dismissal of the suit.

Footnotes

FN1. In its motion for summary judgment, the Comptroller argued that Clark was not entitled to relief as a matter of law. The Comptroller's motion explained that the unclaimed property act did not provide for interest to be paid to owners, that the State's use of unclaimed property was not an unconstitutional taking, and that the reasoning in cases dealing with interpleader and IOLTA funds did not apply to the State's use of unclaimed property.

FN2. Aspects of this case were heard by several judges because the district courts of Travis County have established a central settings docket in which causes are not assigned to a particular judge.

Appendix A

Travis (Tex.) Civ. Dist. Ct. Loc. R. 1.1. Although the rules allow assignment to an individual judge on the suggestion of any judge or after conference with the parties, it was not done in this case. *See id.* 2.6.

FN3. Although the order incorrectly recites that "the requirements of Rule 42 of the Texas Rules of Civil Procedure have not been met because no class member is able to state a viable takings claim," Judge Jenkins's comments in the record and the case-dispositive nature of the order demonstrate that the court's ruling was based on the State's summary judgment motions and not the class certification requirements.

FN4. Special provisions apply to unclaimed wages, stored value cards, traveler's checks, and money orders. *See* Tex. Prop.Code Ann. §§ 72.1015, .1016, .102 (West Supp.2005).

FN5. Similarly, the supreme court of Oklahoma held that unclaimed property is held "in trust" when the Oklahoma statute required such property to be placed in a separate "Unclaimed Property Fund." *TXO Prod. Corp. v. Oklahoma Corp. Comm'n,* 829 P.2d 964, 971-72 (Okla.1992).

FN6. Clark attempts to limit this provision to property that has been physically damaged while in the Comptroller's custody. However, the plain language does not support such a limitation. The statute refers to "damages incurred while the property *or the proceeds from the sale of the property* are in the comptroller's possession." Tex. Prop.Code Ann. § 74.304(d) (West Supp.2005) (emphasis added). The legislature would not have mentioned the proceeds from the sale of property, presumably cash, if it meant to limit liability only for physical damage to property.

FN7. Under the common law, an owner could be shown to have abandoned property by proof of intent to relinquish a known property right. *See, e.g., Huffington v. Upchurch,* 532 S.W.2d 576, 579-80 (Tex.1976); *Railroad Comm'n of Tex. v. Waste Mgmt. of*

Tex., Inc., 880 S.W.2d 835, 843-44 (Tex.App.--Austin 1994, no writ). Texas, like other states, has long provided by statute that property could be presumed abandoned by being unclaimed by its owner for a specified period of years. *See* Act of March 21, 1885, 16th Leg., R.S., ch. 37, §§ 1-2, *reprinted in* 9 H.P.N. Gammel, The Laws of Texas 1822-1897, at 655-66 (Austin, Gammel Book Co. 1898) (repealed) (formerly Tex.Rev.Civ. Stat. art. 3272); Act of Aug. 8, 1961, 57th Leg., 1st C.S., ch. 21, § 1, 1961 Tex. Gen. Laws 49, 49-57 (repealed) (formerly Tex.Rev.Civ. Stat. art. 3272a). The unclaimed property act-whose validity Clark does not challenge-is Texas's current enactment of this sort.

FN8. The Interest on Lawyers Trust Account (IOLTA) program requires certain client funds held by an attorney to be deposited in an interest bearing account. *Phillips v. Washington Legal Found.,* 524 U.S. 156, 159-60, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998). The interest income generated by the fund is paid to a foundation that finances legal services for low-income individuals. *Id.*

APPENDIX B – ORDER DENYING THE PETITION FOR REVIEW TO THE SUPREME COURT OF TEXAS ON MAY 12, 2006

No. 06-0195
IN THE SUPREME COURT OF TEXAS

CHARLES H. CLARK AND ELIZABETH HAJEK, INDIVIDUALLY AND ON BEHALF OF ALL OTHER PERSONS SIMIRLARLY SITUATED,
PETITIONERS

V.

CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS,
RESPONDENTS

DENIAL OF THE PETITION FOR REVIEW

Today, the Supreme Court of Texas denied the petition for review in the above-referenced case.

Dated: May 12, 2006
Austin, Texas

APPENDIX C – ORDER DENYING THE MOTION FOR CLASS CERTIFICATION AND GRANTING DISMISSAL FROM THE AUSTIN DISTRICT COURT ON MARCH 21, 2005

No. GN300872

CHARLES H. CLARK, Individually, and on behalf of those similarly situated, Plaintiff,	§	IN THE DISTRICT COURT
vs.	§	TRAVIS COUNTY, TEXAS
CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS Defendant.	§	353rd JUDICIAL DISTRICT

Order Denying Motion for Class Certification and Granting Dismissal

On March 8, 2005, after notice to the named parties, an evidentiary hearing was held to determine whether this case should proceed as a class action. Charles Clark and Elizabeth Hajek, Plaintiffs, the proponent for class certification appeared in person and by attorney of record. The Defendant, Carole Keeton Strayhorn, Comptroller of Public Accounts, appeared by attorney of record.

The proposed class was sought to be defined as follows:

> All persons, entities and organizations that, on or after March 19, 1999, received payment under Chapter 74 of the Texas Property Code from the Comptroller for a claim related to property valued at $100 or more. Specifically excluded from the class are all Travis County District Judges and class counsel.

Appendix C

After examining the record, hearing the evidence presented by the parties, and listening to legal argument, the court is of the opinion that a class action should not be certified and makes the following ruling:

In accordance with the Texas Supreme Court's recent holding in *State Farm Mutual Automobile Insurance Co. v. Lopez*, 2004 WL 2754648 at *6*Tex.), the district court tried the issue of whether a class member can state a viable takings claim, before considering a ruling on the issue of class certification. The court holds that the requirements of Rule 42 of the Texas Rules of Civil Procedure have not been met because no class member is able to state a viable takings claim.

IT IS THEREFORE ORDERED that the motion to certify the class is denied.

IT IS FURTHER ORDERED that this case is DISMISSED for the reason that plaintiffs have no viable claim. All costs of court are taxed against plaintiffs. All other requested relief is DENIED.

SIGNED on March 21, 2005.

/s/
THE HONORABLE SCOTT JENKINS

APPROVED
Office of the Attorney General
By: /s/
Maureen Powers
Attorney for Defendant

APPENDIX D – ORDER DENYING THE COMPTROLLER'S MOTION FOR REHEARING ON THE PARTIAL SUMMARY JUDGMENT ON JANUARY 24, 2005

No. GN300872

CHARLES H. CLARK, Individually, and on behalf of those similarly situated, Plaintiff,	§	IN THE DISTRICT COURT
vs.	§	TRAVIS COUNTY, TEXAS
CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS Defendant.	§	353rd JUDICIAL DISTRICT

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING ON MOTION FOR SUMMARY JUDGMENT

On January 19, 2005, the Court considered the Defendant's Motion for Rehearing on Motion for Summary Judgment. After reviewing the pleadings and papers on file, and having considered the arguments of counsel, the Court is of the opinion that the motion should be **DENIED**. Accordingly, it is

ORDERED that Defendant, Carole Keeton Strayhorn, Comptroller of Public Accounts' Motion for Rehearing on Motion for Summary Judgment is denied.

Signed the 24th day of January, 2005.

/s/
Honorable Gisela D. Triana
Presiding Judge

APPENDIX E – ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DECEMBER 2, 2004

No. GN300872

CHARLES H. CLARK, Individually, and on behalf of those similarly situated, Plaintiff,	§	IN THE DISTRICT COURT
vs.	§	TRAVIS COUNTY, TEXAS
CAROLE KEETON STRAYHORN, COMPTROLLER OF PUBLIC ACCOUNTS Defendant.	§	353rd JUDICIAL DISTRICT

ORDER GRANTING CLARK'S MOTION FOR PARTIAL SUMMARY DECLARATORY JUDGMENT AND DENYING COMPTROLLER'S MOTION FOR SUMMARY JUDGMENT

On October 19, 2004, the court heard Charles Clark's motion for partial summary declaratory judgment and the Comptroller's motion for summary judgment. Both parties sought a summary declaratory judgment to determine their rights and legal relations to the interest earned on unclaimed property funds held by the Comptroller under Texas Property Code Chapter 74.

After hearing argument and having reviewed the motions for summary judgment, the responses, and the other papers filed in this cause, the court ORDERS that:

1. Clark's motion for partial summary declaratory judgment is GRANTED. The court declares: (a) interest earned on Clark's $140 while held by the Comptroller under Chapter 74 of the Texas Property Code is Clark's property; and (b) the Comptroller's retaining interest accruing on Clark's property while it was in the

Appendix E

Comptroller's custody is a taking for public use without just compensation that violates the Texas and United States Consitutions; and

2. the Comptroller's motion for summary judgment is DENIED.

SIGNED on December 2, 2004.

/s/
Patrick Keel
District Judge